ARGUMENT

The court of appeals' unpublished judgment is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner does not dispute that the Attorney General properly invoked the state secrets privilege and that the privilege prevents the discovery of classified information and requires the exclusion of such information from the case. Nor could she. "The state secrets privilege is a common law evidentiary rule that allows the government to withhold information from discovery when disclosure would be inimical to national security." *Zuckerbraun* v. *General Dynamics Corp.*, 935 F.2d 544, 546 (5th Cir. 1991); see *United States* v. *Reynolds*, 345 U.S. 1, 6-7 (1953). As this Court has explained, the privilege may be invoked by "the head of the department which has control over the matter, after actual personal consideration by that officer." *Id.* at 8 (footnote omitted). Where there is a "reasonable danger" that disclosure of the information would expose state secrets that, "in the interest of national security, should not be divulged," the privilege applies and is absolute. *Id.* at 10. "[E]ven the most compelling necessity cannot overcome the claim of privilege" if state secrets are at stake. *Id.* at 11.

The Attorney General properly invoked the state secrets privilege after personally considering the matter. Pet. App. 16a-24a. The district court carefully reviewed the classified declarations, and requested an additional declaration, before satisfying itself that "the invocation of the state secrets privilege is proper." *Id.* at 22a-23a. The court of appeals likewise questioned

government counsel about the classified materials at oral argument. The classified declarations, which are part of the record in the court of appeals,[1] amply support the lower courts' conclusion that the state secrets privilege applies in this case. Petitioner does not appear to seek further review of that fact-bound determination.

2. Instead, petitioner argues (Pet. 18-26) that the district court should not have dismissed this case, but instead should have permitted non-privileged discovery.

a. It is common ground that in some cases the state secrets privilege does not require dismissal because a case may be able to proceed based solely on non-privileged evidence. In *Reynolds*, for example, this Court remanded for further proceedings after upholding the government's invocation of the state secrets privilege because it appeared that the plaintiffs could "adduce the essential facts as to [the elements of their claims] without resort to material touching upon military secrets." 345 U.S. at 11.

In other cases, however, the privileged information is so central to the disputed issues that the case cannot proceed without it. The courts of appeals have uniformly recognized that dismissal is appropriate if the exclusion of the privileged evidence would prevent the plaintiff from establishing a prima facie case or prevent a defendant from establishing a valid defense. See, *e.g.*, *Zuckerbraun*, 935 F.2d at 547; *In re United States*, 872 F.2d 472, 476 (D.C. Cir.), cert. dismissed, 493 U.S. 960 (1989); *Kasza* v. *Browner*, 133 F.3d 1159, 1166 (9th Cir.), cert. denied, 525 U.S. 967 (1998). Dismissal is also appropriate when the very subject of the suit is a state

---

[1] The government also could furnish a copy of those declarations directly to the Court in connection with its consideration of the petition.

secret. See, *e.g.*, *Kasza*, 133 F.3d at 1166; *McDonnell Douglas Corp.* v. *United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003).

Petitioner conceded below that dismissal is appropriate in those circumstances. See Pet. C.A. Br. 17, 22. The district court correctly determined that dismissal is appropriate in this case because "the plaintiff is not only unable to prove the prima facie elements of each of her claims without the disclosure of privileged information, but * * * the defendants are unable to assert valid defenses to her claims without such disclosure," Pet. App. 27a. The classified materials show that the district court's conclusion is correct and that any prior disclosures in the media or elsewhere did not contradict the Attorney General's assertion that further disclosure would harm national security. See *id.* at 23a-24a. As the district court recognized, however, a detailed explanation of those points cannot be made publicly because doing so would "forc[e] a disclosure of the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8; see Pet. App. 22a-23a. The court of appeals' unpublished order affirming the district court's application of settled legal principles to the facts of this case does not warrant further review.[2]

---

[2] Petitioner repeatedly refers (Pet. 8-9, 24-25) to a report of the Department of Justice Office of Inspector General (OIG). But that report, which recognized the sensitivity of the information at issue here, is consistent with the assertion of the privilege and dismissal of this suit. Although the OIG released a 35-page unclassified summary of its classified report, the full classified report is much longer and has not been released to the public. See OIG, *A Review of the FBI's Actions in Connection with Allegations Raised By Contract Linguist Sibel Edmonds—Unclassified Summary* 2-3 (Jan. 2005). The unclassified summary explains that it "does not include all of the facts in the full report" and is sometimes "difficult to understand * * * because much

b. Although petitioner contends (Pet. 18-20) that the courts of appeals are divided on the proper procedures a court should follow in determining whether to dismiss a case, there is no such conflict, and the district court afforded ample procedural protections to petitioner.

i. Petitioner contends primarily (Pet. 18, 19) that "courts have disagreed about whether the state secrets privilege ever justifies dismissal at the pleading stage," or whether courts should instead "first allow[] non-privileged discovery" before dismissing. But petitioner cites no case in which any court of appeals has ever held that dismissal is *never* appropriate at the pleading stage. Nor, conversely, has petitioner cited any case in which a court of appeals has held that dismissal is *always* appropriate at the pleading stage.

Instead, the courts that have dismissed cases have done so because it would not have been possible to litigate the cases without revealing privileged information, without regard to whether the cases were then at the pleading or a later stage of the litigation.[3] In contrast,

---

of the information from the full report remains classified and cannot be included." *Id.* at 3 n.1. Because the information in the public record is necessarily incomplete, it does not support the disclosure of extensive classified details, the release of which would cause serious harm to national security.

[3] See *Zuckerbraun*, 935 F.2d at 547-548; *Bareford* v. *General Dynamics Corp.*, 973 F.2d 1138, 1142, 1144 (5th Cir. 1992), cert. denied, 507 U.S. 1029 (1993); *Tenenbaum* v. *Simonini*, 372 F.3d 776, 777 (6th Cir.), cert. denied, 125 S. Ct. 605 (2004); *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc); *Black* v. *United States*, 62 F.3d 1115, 1119 (8th Cir. 1995), cert. denied, 517 U.S. 1154 (1996); *Bowles* v. *United States*, 950 F.2d 154, 156 (4th Cir. 1991); *Fitzgerald* v. *Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1243-1244 (4th Cir. 1985); *Kasza*, 133 F.3d at 1170; *Molerio* v. *FBI*, 749 F.2d 815, 822-826 (D.C. Cir. 1984); *McDonnell Douglas*, 323 F.3d at 1022.

the courts that have not dismissed at the pleading stage or some later stage have emphasized that it was possible that the cases *could* be litigated to final judgment without disclosing privileged information.[4] All of the courts of appeals have applied the same legal standard—whether the case could be litigated without disclosing privileged information—and have based their decisions on the facts of each case. In *Ellsberg* v. *Mitchell*, 709 F.2d 51 (D.C. Cir. 1983), cert. denied, 465 U.S. 1038 (1984), for example, the D.C. Circuit affirmed the dismissal of claims as to which the plaintiff could not "make out a *prima facie* case without the [privileged] information," but reversed the dismissal of other claims as to which the plaintiff might have been able to do so. *Id.* at 65, 68. The erroneousness of petitioner's assertion of a circuit split is further underscored by the fact that she puts some circuits on *both* sides of the supposed circuit split, when in reality the cited decisions applied the same legal standards to different facts in a consistent manner.[5]

Nor would a categorical rule precluding dismissal at the current stage make sense. As the privileged facts of

---

[4] See *In re United States*, 872 F.2d at 478-479; *DTM Research, L.L.C.* v. *AT&T*, 245 F.3d 327, 333-334 (4th Cir. 2001); *Monarch Assurance P.L.C.* v. *United States*, 244 F.3d 1356, 1364-1365 (Fed. Cir. 2001); *Clift* v. *United States*, 597 F.2d 826, 830 (2d Cir. 1979); *Heine* v. *Raus*, 399 F.2d 785, 791 (4th Cir. 1968).

[5] See *DTM Research*, 245 F.3d at 334 (Fourth Circuit decision remanding for further proceedings while explaining the consistency of that result with other Fourth Circuit cases, including *Farnsworth Cannon*, *supra*, which petitioner places on the other side of the supposed circuit split, see Pet. 19); *Molerio*, *supra* (D.C. Circuit decision affirming dismissal while following and distinguishing on its facts that circuit's decision in *Ellsberg*, *supra*, which petitioner places on the other side of the supposed circuit split, see Pet. 20).

this case demonstrate, it is clear at the outset of some cases that litigation cannot proceed without disclosing privileged information. In such cases, subjecting the parties to non-privileged discovery would be pointless, and would serve only to subject the parties to unnecessary effort and expense while risking the disclosure of sensitive information. Just as in any other context, cases should be dismissed when further non-privileged factual development could not alter the result. Cf. Fed. R. Civ. P. 56(c) (summary judgment is appropriate when there is no genuine dispute of *material* fact).

Although petitioner relies heavily (Pet. 14, 17-18, 23) on *Totten* v. *United States*, 92 U.S. 105 (1876), that case does not support her position. *Totten* articulated the "longstanding rule * * * prohibiting suits against the Government based on covert espionage agreements." *Tenet* v. *Doe*, 125 S. Ct. 1230, 1233 (2005). This Court took great care in *Tenet* to distinguish the state secrets privilege from *Totten*'s "broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden." *Id.* at 1236; see *id.* at 1237 (rejecting the view that "the *Totten* bar has been reduced to an example of the state secrets privilege"). Petitioner appears to assume (see Pet. 23) that because a *Totten* case *must* be dismissed at the pleading stage, state secrets cases may *never* be dismissed at that stage. But there is no basis for that assumption. If anything, *Totten* supports dismissal here to the extent that it stands for the proposition that a case should be dismissed if it cannot be litigated without disclosing classified information. See *Totten*, 92 U.S. at 107.

ii. The other conflicts alleged by petitioner are both illusory and irrelevant. Although petitioner contends (Pet. 21) that the circuits are divided on "whether a

judge is obligated to examine the allegedly privileged material," this Court already held in *Reynolds* that whether a judge must analyze the actual privileged material depends upon the individualized circumstances of each case. 345 U.S. at 10-11. The cases cited by petitioner (Pet. 21) are not to the contrary. See *Ellsberg*, 709 F.2d at 59 n.37 (stating that "*in camera* review of the material is * * * obligatory" where, unlike here, "a litigant must lose if the claim is upheld *and the government's assertions are dubious*") (emphasis added); *ACLU* v. *Brown*, 619 F.2d 1170, 1173 (7th Cir. 1980) (en banc) (stating that in camera review of documents is "often" required, but not describing the circumstances under which such review is in fact required).

In any event, the question whether a court must examine allegedly privileged material is not presented by this case. The district court carefully reviewed classified declarations that described the privileged information. In the court of appeals, petitioner never argued that the district court should have undertaken further review of the classified information, and instead recognized that "the court apparently considered defendants' secret evidence in detail." Pet. C.A. Br. 26-27. Because the issue was neither pressed nor passed upon below, further review is unwarranted. See, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

iii. The final alleged circuit split relates to whether a court should consider alternatives to dismissal. Pet. 21. There is no such circuit split because no court of appeals has refused to consider alternatives. Although petitioner contends that alternatives were not expressly considered in *Farnsworth Cannon* and *Tenenbaum*, both of those decisions expressly concluded that further litigation would inevitably lead to the disclosure of state

secrets, which necessarily means that effective alternatives to dismissal were not available. See *Farnsworth Cannon*, 635 F.2d at 281; *Tenenbaum*, 372 F.3d at 777. Neither decision ruled out the use of alternatives in appropriate cases.

In any event, the district court in this case *agreed* with petitioner that alternatives to dismissal should be considered, and determined that "there are no viable alternatives" in the circumstances of this case. Pet. App. 32a n.7. Thus, even if there were a circuit split on the issue, it would not be implicated by this case.

c. Although petitioner contends (Pet. 22) that urgent guidance is needed because "the government's use of the privilege is on the rise," her statistics indicate that the state secrets privilege has been litigated on average only twice a year during the past quarter-century, both before and after the events of September 11, 2001. See *ibid.* This Court already articulated the overarching legal principles in *Reynolds*, *supra*, and the courts of appeals have applied the privilege in a consistent and practical manner ever since, as explained above. Further guidance on the state secrets privilege does not appear to be needed, either in general or on the specific procedural issues raised by petitioner.

3. Petitioner's request (Pet. 26-29) for review of the court of appeals' decision to close the courtroom to members of the public comes too late. The argument has already been held, the public has already been excluded from the courtroom, and no action by this Court could alter those facts. Before the argument was held, petitioner and members of the media sought reconsideration of the court of appeals' decision to close the courtroom, but that court denied their motions and no one sought review from this Court before the argument was held.

Even now the intervening members of the media have not sought further review.

There is no ongoing injury from the court of appeals' precautionary closing of the courtroom because that court released a transcript of the argument shortly after it was held. Petitioner has identified no further remedy this Court could order.

Nor does this case satisfy the "capable of repetition yet evading review" exception to the mootness doctrine. That exception "applies only in exceptional situations where the following two circumstances [are] simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998) (internal quotations and citations omitted). Neither circumstance is satisfied here. The issue can be fully litigated, as demonstrated by the cases cited by petitioner in which the issue was fully litigated. See Pet. 26-28. And there is no reason to expect that petitioner herself will be subject to the same action again.

Even if the issue were not moot, the court of appeals' cursory, unpublished order would not warrant further review. Petitioner does not appear to allege a conflict between that order and any decision of another court of appeals regarding whether the courtroom should have been closed under the circumstances of this case. The court of appeals' order lacks precedential significance in any event because it does not articulate any legal standards that could be applied to other cases. Cf. D.C. Cir. Rule 36(c)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DOUGLAS LETTER
H. THOMAS BYRON III
Attorneys

OCTOBER 2005